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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION**

Donald Fry, *et al.*,

Plaintiffs,

vs.

Capital One Financial Corporation,

Defendant.

Case Number: 4:25-cv-03769-HSG

**DEFENDANT'S RESPONSE TO
MAY 12, 2025, ORDER**

Hon. Haywood S. Gilliam, Jr.

1 On May 1, 2025, Plaintiffs sought a preliminary injunction blocking Capital
2 One’s acquisition of Discover—which is set to close on May 18. *See* Mot., ECF No. 5.
3 Capital One responded to that Motion on May 6. ECF No. 27. Plaintiffs replied on
4 May 8. ECF No. 29. On May 12, this Court ordered the parties to provide precedent
5 from the Supreme Court, the Ninth Circuit, or other courts of appeals addressing
6 “whether a plaintiff seeking preliminary injunctive relief may rely solely on the
7 allegations in the complaint, or instead must produce evidence supporting its factual
8 contentions.” ECF No. 33.

9 Under Ninth Circuit caselaw, a preliminary-injunction movant must introduce
10 evidence supporting their factual allegations. *Herb Reed Enters., LLC v. Florida Ent.*
11 *Mgmt.*, 736 F.3d 1239, 1250–51 (9th Cir. 2013) (“Those seeking injunctive relief must
12 proffer evidence sufficient to establish a likelihood of irreparable harm.”); *Gonzalez*
13 *v. Arizona*, 485 F.3d 1041, 1050 (9th Cir. 2007) (holding that the movant had not
14 demonstrated a likelihood of success because “[t]here [was] no evidence in the record”
15 to support their assertions, including “no affidavits or declarations.”).¹ “[T]he mere
16 allegations of a complaint will never suffice to establish the prerequisites for
17 obtaining a preliminary injunction.” *Takiguchi v. MRI Int’l, Inc.*, 611 F. App’x 919,
18 921 (9th Cir. 2015) (unpub.) (citing *Winter v. NRDC, Inc.*, 555 U.S. 7, 20 (2008)).

19 Indeed, merely submitting *some* evidence is not enough—the plaintiff must
20 make a “clear showing” that they have satisfied the four preliminary-injunction
21 factors. *See Winter*, 555 U.S. at 22; *Starbucks Corp. v. McKinney*, 602 U.S. 339, 345
22 (2024). The Supreme Court has indicated that this imposes a “requirement for
23 substantial proof” that is “much higher” than the standard required even for
24 summary judgment. *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997). It would thus
25 be inappropriate to issue a preliminary injunction on a pleadings standard (*i.e.*,

26
27 ¹ Unless otherwise indicated, internal quotation marks, citations, and alterations
28 have been omitted from quotations throughout.

1 allowing the plaintiff to rely solely on the complaint’s allegations). For example, as
2 the Seventh Circuit held in *Alarm Detection Systems, Inc. v. Village of Schaumburg*,
3 although the plaintiffs had “*pleaded*” a plausible claim sufficient to survive a motion
4 to dismiss, they had not “*demonstrated* a likelihood of success on the merits, as
5 required for a preliminary injunction.” 930 F.3d 812, 823 (7th Cir. 2019).

6 The Ninth Circuit, too, has rejected preliminary-injunction requests where the
7 supporting evidence was insufficient to meet the movant’s burden. For example, in
8 *K-2 Ski Co. v. Head Ski Co.*, the Ninth Circuit reversed a preliminary injunction,
9 concluding that, even where the movant provides supporting affidavits, “if the facts
10 so appearing consist largely of general assertions which are substantially
11 controverted by counter-affidavits, a court should not grant [a preliminary injunction]
12 unless the moving party makes a further showing sufficient to demonstrate that he
13 will probably succeed on the merits.” 467 F.2d 1087, 1088–89 (9th Cir. 1972); *see Am.*
14 *Passage Media Corp. v. Cass Commc’ns, Inc.*, 750 F.2d 1470, 1473 (9th Cir. 1985)
15 (reversing preliminary injunction based on “conclusory” affidavits); *accord Oakland*
16 *Tribune, Inc. v. Chron. Pub. Co.*, 762 F.2d 1374, 1377 (9th Cir. 1985).²

17 The Ninth Circuit has been particularly emphatic about the need for evidence
18 establishing an irreparable harm before a district court can issue a preliminary
19 injunction. For example, in *Herb Reed Enterprises*, the Ninth Circuit reversed a
20 preliminary injunction, holding that “[t]hose seeking injunctive relief must proffer
21 evidence sufficient to establish a likelihood of irreparable harm” and determining
22 that the district court’s irreparable-harm analysis was limited to “conclusory”
23 “platitudes” rather than being “grounded in any evidence.” 736 F.3d at 1250–51.
24 Likewise, in *American Passage*, the Ninth Circuit reversed a preliminary injunction,
25

26 ² As *K-2 Ski* explains, a *verified* complaint, which operates as an affidavit, “may afford
27 the basis for a preliminary injunction,” but again, only where that evidence is reliable
28 and sufficient to carry the plaintiff’s evidentiary burden. *See* 467 F.2d at 1087–89.

1 concluding that, although the movant had alleged irreparable harm and had even
2 submitted supporting affidavits, those “affidavits [were] conclusory and without
3 sufficient support in facts.” 750 F.2d at 1473. In *Titaness Light Shop LLC v. Sunlight*
4 *Supply*, the Ninth Circuit again reversed a preliminary injunction, concluding that
5 although the movant had “asserted” that it would suffer irreparable harm, it “did not
6 produce evidence establishing a likelihood of irreparable harm” and thus “was not
7 entitled to preliminary relief.” 585 F. App’x 390, 391–92 (9th Cir. 2014) (unpub.). And
8 in *Prestige Transportation v. U.S. Small Business Administration*, the Ninth Circuit
9 affirmed the denial of a preliminary injunction where, “despite alleging” irreparable
10 harm, Plaintiffs “failed to submit *any* evidence” supporting that claim. 850 F. App’x
11 551, 551 (9th Cir. 2021) (unpub.). In each of these cases the movant had alleged or
12 asserted irreparable harm. Nonetheless, in each of these cases the Ninth Circuit held
13 that a preliminary injunction was unavailable because the movant had not
14 introduced sufficient evidence supporting that assertion.

15 Other circuits have likewise held that a preliminary-injunction movant cannot
16 simply rely on allegations. As the Fourth Circuit recently held, “a plaintiff seeking a
17 preliminary injunction generally cannot rely on mere allegations in the complaint but
18 must come forward with some evidence showing a likelihood of success on the merits.”
19 *Mahmoud v. McKnight*, 102 F.4th 191, 203 (4th Cir. 2024) (citing *Winter*, 555 U.S. at
20 20–21), cert. granted *sub nom.* *Mahmoud v. Taylor*, 145 S. Ct. 1123 (2025) (cert.
21 granted on religious-liberty issue). Or as the Tenth Circuit has explained:
22 “[p]reliminary injunctive relief requires evidentiary support” and “bare allegations
23 are not a substitute for evidence.” *Boles v. Colo. Dep’t of Corr.*, No. 22-1086, 2023 WL
24 1463248, at *5 (10th Cir. Feb. 2, 2023) (unpub.). Indeed, some circuits have gone
25 further and held that generally, “a preliminary injunction should not issue on the
26 basis of affidavits alone.” *Atari Games Corp. v. Nintendo of Am., Inc.*, 897 F.2d 1572,
27 1575 (Fed. Cir. 1990) (citing Second and Seventh Circuit caselaw).

1 Also, as the Supreme Court and the Ninth Circuit have held, under Federal
2 Rule of Civil Procedure 52(a)(2), a district court must issue “findings of fact”
3 supporting any preliminary injunction. *Mayo v. Lakeland Highlands Canning Co.*,
4 309 U.S. 310, 319 (1940); *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1157
5 (9th Cir. 2007). And findings of fact must be supported by sufficient record evidence.
6 *See Flathead-Lolo-Bitterroot Citizen Task Force v. Montana*, 98 F.4th 1180, 1188 (9th
7 Cir. 2024). That is impossible to do in the absence of any evidence.

8 Finally, awarding a preliminary injunction based solely on the allegations is
9 at odds with Supreme Court precedent. As the Court has held, a preliminary-
10 injunction movant “must *establish*” the four preliminary-injunction factors. *Winter*,
11 555 U.S. at 20 (emphasis added). The Court did not say that a plaintiff must *allege*
12 the four factors. And the Supreme Court has also repeatedly cautioned that a
13 preliminary injunction is “extraordinary” relief. *Winter*, 555 U.S. at 22; *Starbucks*,
14 602 U.S. at 345. But if a plaintiff could obtain a preliminary injunction on a
15 complaint’s allegations alone, with no more judicial scrutiny than attends a motion
16 to dismiss, such relief would go from being extraordinary to commonplace.

17 * * *

18 Defendant is unaware of any decision from either the Supreme Court or the
19 Ninth Circuit holding that a movant may obtain the extraordinary relief of a
20 preliminary injunction on mere allegations alone. To the contrary, as discussed above,
21 decisions from the Supreme Court, the Ninth Circuit, and other circuits all show the
22 opposite.

23
24 Dated: May 13, 2025

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Attestation

Under Civil Local Rule 5-1(i)(3), I hereby attest that the other signatory to this document has concurred in its filing.

/s/ Ryan A. Shores